In The

Supreme Court of the United States

APR 8 19

Term, 1974

No. 73-1502

RAMON COLON,

Petitioner,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, ROBERT J. MAGNUM, JACK M. SABLE, COMMISSIONERS and ROBERT RUIZ, ASSISTANT COMMISSIONER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Ramon Colon respectfully prays that a writ of certiorari issue to reverse the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 10, 1974.

OPINION BELOW

The Court of Appeals of the Second Circuit affirmed the decision of the District Court of the Southern District of New York without opinion. The opinion of the District Court for the Southern District of New York (Bonsal, J.) appears in the appendix (4a). The Appellate Division of the State of New York affirmed the decisions of the State Human Rights Appeal Board. The decision of the New York State Human Rights Appeal Board appears in the appendix (3a). That opinion affirmed the decision of the State Division of Human Rights. The Decision of the State Division of Human Rights appears in the appendix (1a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 10, 1974. A petition for certiorari was filed within 60 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does Section 297.2 of the Executive Law of the State of New York allow the State Human Rights Commission to decline jurisdiction over a grievance of one of its own employees for "policy reasons" and if so is the statute constitutional?

2. Is the larger statutory scheme allowing two forums (the Commission or the state courts) still nevertheless discriminatory absent a clear statutory prohibition preventing States Human Rights' employees from using the Commission to redress grievances?

3. Must plaintiff-appellant be given reasons for a denial of promotion and an opportunity to be heard?

STATUTORY PROVISIONS INVOLVED

In addition to Section 297.2 of the Executive Law the following statutory provisions are involved:

United States Constitution, Fourteenth Amendment, Section 1

> " . . . nor shall any State deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the law."

42 U.S.C. Section 1981

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, license and exactions of every kind and to no other."

42 U.S.C. Section 1983 further states:

> "Every person who, under color of any statute, ordinance, regulations, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof, to the deprivation of any right, privilege or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Sections 297.1 and 297.2 of the Executive Law of the State of New York read as follows:

"1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney at law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The industrial commission or the attorney-general or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the Civil Practice Law and Rules. Any employer whose employees or some of them refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. After the filing of any complaint the division shall promptly serve copy thereof upon the respondent and all persons it deems to be necessary

parties and make prompt investigation therewith. Within 15 days after a complaint is filed the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction and that probable cause does not exist, the commission shall issue and cause to be served an order dismissing such allegations of said complaint as to such respondent."

STATEMENT OF THE CASE

This is an action brought by an employee of the Division of Human Rights of the State of New York, who had been "passed over" for promotion from field representative to various other positions. Jurisdiction of this Court is based on the challenged constitutionality of the state statute *infra*. His qualifications and extensive experience are fully set forth in the complaint. He seeks a judgment requiring defendants to appoint him retroactively and with back pay and full pension benefits.

The gravamen of this proceeding is the unconstitutional and arbitrary application of the New York State Executive Law, Article 15, Section 297.2 which states in part:

> "If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist the Commissioner shall issue and cause to be

> served on the complainant an order dismissing such allegations of said complaint as to such respondent."

In point of fact, on or about November 5, 1971, the State Division of Human Rights, determined that it had no jurisdiction in this matter, further stating:

> "It is the *policy* of the State Division of Human Rights not to accept jurisdiction in any case in which discrimination is charged against persons who would be called upon to investigate and/or determine the charges." (Emphasis supplied.)

The decision was upheld by the State Human Rights Appeal Board, the New York Supreme Court, Appellate Division, no opinion, and by the Federal District Court (S.D.N.Y.), Bonsal, J.

"Policy" rather than "lack of jurisdiction" was given as the reason for declining jurisdiction.

Plaintiff, who had been employed by the Commission for a minimum of seven years and who held the position of field representative had extensive qualifications, was passed over for a person with less experience than plaintiff, and on the basis of ethnic politics. Mr. Colon is of Puerto Rican extraction and the persons promoted in each instance were negroes.

No reason was given to plaintiff for defendants' failure to appoint him thus keeping the defendants' contention that they are under no obligation to give reasons for their

actions. This concept of their responsibilities as public officials can no longer be acquiesced in by the courts.

It has become increasingly clear that the refusal of administrative officals to give to employees who are deprived of valuable rights, an opportunity to be heard is a violation of the procedural due processes, guarantees of the state and federal constitutions and the exercise of the Executive Law Section 297.2 is patently unconstitutional in its refusal for *reasons of policy* to accept jurisdiction.

Judge Bonsal limits his decision to a review of the provisions of the New York State Executive Law, holding them to be constitutional because they allow an aggrieved person two forums, i.e., the Commission and the courts and additionally finds that the prohibition against hearing cases of its own employees was a reasonable prohibition. Judge Bonsal avoids strict construction of the statutory wording "lacks jurisdiction" set forth in Executive Law 297.2, but instead allows the Commission to decline jurisdiction. In point of fact every complainant has two forums *except* employees of the Commission, one of which an aggrieved petitioner may not have the time or resources to afford.

REASONS FOR GRANTING THE WRIT

Certain procedural questions must be resolved before the Court reaches the merits herein, First, it is said that the case is moot, in that the named plaintiff, Ramon Colon, has since retired. The fact that the incident which gave rise to the controversy herein has been resolved, the underlying problem remains. The Department continues to fail to give hearings to its own employees, most of whom are

minorities and most of whom cannot afford protracted litigations. This allegedly arbitrary procedure continues to threaten members of plaintiff's class. See *Kelly v. Wyman*, 294 F. Supp. 893, 908 (D.C. 1968); *Singleton v. Board of Com'rs, etc.*, 356 F.2d 771 (5 Cir. 1966).

I.

The statute (Executive Law 297.2) allows dismissal when the Commission "lacks jurisdiction" not when as a matter of policy it refuses to accept jurisdiction.

The case at bar would not now be appealed if the applicable statute, *supra*, had contained language granting the right to refuse jurisdiction for policy reasons. There has been no showing to this day that the Commission "lacks" jurisdiction, only that it chose not to exercise it. The Commission has no such power under the present statutory scheme regardless of how reasonable the refusal might be.

II.

The larger statutory scheme, allowing a choice of two forums for some but not for others is discriminatory.

Had the above section clearly stated that it lacked jurisdiction over its own employees then the plaintiff herein would have saved time and money knowing that he should have chosen the alternative route, i.e., the state courts. Judge Bonsal fails to note that plaintiff was told that plaintiff's recourse was to "appeal this order to the State Human Rights Appeal Board" in the very text of the opinion of the Human Rights Board and not to the state court. Plaintiff and Judge Bonsal were thereby misled.

III.

Applications of recent decisions of the United States Supreme Court and other courts relating to due process in administrative proceedings require that plaintiff be given reasons for his failure to be appointed and an opportunity to be heard.

Cases involving public employment call for a re-examination of previous holdings in light of contemporary requirements of elementary due process, wherever the state has not even required a modicum of due process, i.e., *Kaminsky v. Leary*, 33 A.D. 2nd 552 (1st Dept. 1969), aff'd, 28 N.Y. 2d 959 (1971).

In the leading case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court held that procedural due process requires a predetermination evidentiary hearing prior to discontinuance of welfare benefits. In so holding the Court set forth the criteria for determining what procedures due process requires in any given set of circumstances as depending upon the extent of the loss to the plaintiff and the necessity for summary adjudication by the government.

There is little question in the instant case that the failure to be promoted, thus condemning the plaintiff to a lifetime in a dead-end job as well as loss of pension benefits constitutes a grievous loss to such employee.

There does not seem to be an equivalent disadvantage to the government in requiring it to give a reason for its actions and to afford a hearing, if requested, to the employee, to give him an opportunity to show arbitrariness on the part of the responsible officials.

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly, supra*, 269.

The Court cited approvingly two articles by Charles A. Reich in the Yale Law Journal. In one of them, *The New Property*, 73 Yale Law Journal 733 (1964) he wrote:

> "The denial of any form of privilege or benefit on the basis of undisclosed reasons should no longer be tolerated . . . " (p. 784).

It can no longer be seriously contended that such requirements do not apply to public employees. *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

In the instant case, the requirement that a public official exercise discretion in a manner free from arbitrariness or caprice means that issues of fact are often involved. Thus, a decision not to appoint a particular person could be based on oral or written reports containing false statements which the employee has no opportunity to rebut. Or a personality conflict with a supervisor might be involved.*

---

* In *Ramos v. Department of Mental Hygiene*, 34 A.D. 2nd 925 (1970), the First Department held that a hearing was required for a probationary employee who alleged that her dismissal was due to a personality conflict and unrelated to work performance. See also *Berger v. Walsh*, 266 App. Div. 592 (First Department, 1943). (Cf. *Fink v. Finegan*, 270 N.Y. 356 (1936), where the court held that one could not be eliminated for lack of force or executive ability unless it was shown that these criteria could not be competitively tested or objectively ascertained.)

Or the appointing authority may not like the employee's politics. Moreover, since a public official is not required to give a reason for failure to promote a smart official who keeps his mouth shut can pass over qualified employees for the most specious reasons. But such action does not comport with the clear requirements of due process. As the Court said in *Goldberg v. Kelly*, *supra*, at 267-268:

> "The fundamental requisite of due process of law is the opportunity to be heard '. . .the hearing must be at a meaningful time and in a meaningful manner. . . .' In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, an effective opportunity to defend by confronting any adverse witnesses and by presenting orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or misapplication of rules or policies to the facts of a particular case."

In a recent case involving the application of due process requirements to public employment, *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971), the court held that a non-tenured professor was entitled to be given reasons for his dismissal and a hearing. Citing *Goldberg v. Kelly*, *supra*, and referring to the balancing of interests involved, the court held that the substantial adverse effect which the professor's non-retention would have on his career outweights the governmental interest in

"unembarrassed exercise of discretion." See also *Meredith v. Allen County Memorial Hosp. Comm'n.*, 397 F.2d 33 (6th Cir. 1968). *Goldberg v. Kelly, supra*, has also been extended in *Java, et al. v. Dep't of California*, 317 F. Supp. 875 (N.D. Calif. 1970) to unemployment compensation.

New York courts also applied the rule enunciated in *Goldberg v. Kelly, supra.* Thus in *William v. White Plains Housing Authority*, 62 M. 2d 613 (Supreme Ct. Westch. Co. 1970), aff'd, 35 A.D. 2d 965, the Court, citing *Goldberg v. Kelly*, held that the hearing afforded tenants of public housing prior to eviction did not comply with due process requirements. To ensure that an eviction is not arbitrary or based upon mere whim or caprice, the tenant must be advised of the reason for his eviction and an opportunity to be heard at a meaningful time and in a meaningful manner. The Court, in coming to its conclusion, stated (62 Misc. 2d 613):

> "It can no longer be disputed that due process of law extends to those situations where a citizen may be deprived of life, liberty or property whether the proceeding be judicial, administrative or executive in nature.... This is rooted in a fundamental concept that the essence of due process is the protection of the individual against arbitrary action." *Ohio Bell Telephone v. Public Utilities Commission*, 301 U.S. 292, 302; *Slochower v. Board of Education*, 350 U.S. 551, 559.

In *Crow v. California Dept. of Human Resources*, 325 Fed. Supp. the court stated at 1318:

> "The right to confront and cross examine witnesses, where an important decision hinges on a question of fact, is *not* an 'extraordinary remedy.' It has been found by the Supreme Court to be constitutionally mandated 'in almost every setting'." Citing *Goldberg v. Kelly*.

The statute in the instant case encourages discrimination. The great number of people working in the public sector are minorities to which this remedy is foreclosed. 333 F.S. 662.

Grune v. McElroy, 360 U.S. 474, 496-497 (1959) is particularly important here.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who in fact, might be perjurious or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in nominal cases . . .but also in all types of cases where administrative . . .actions were under scrutiny."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

s/ Edward H. Wolf
Attorney for Petitioner

APPENDIX A – DECISION OF NEW YORK STATE DIVISION OF HUMAN RIGHTS

DETERMINATION AND ORDER AFTER INVESTIGATION

Case No. Ia-CN-1392-71: Ramon Colon vs. State of New York, Division of Human Rights; Jack M. Sable, Commissioner; Ruperto Ruiz, Assistant Commissioner and Robert J. Mangum.

On October 20, 1971, Ramon Colon, who is of Puerto Rican national origin, filed a verified complaint with the State Division of Human Rights charging the above named respondents with an unlawful discriminatory practice relating to employment by denying him equal terms, conditions and privileges of his employment because of his national origin, in violation of the Human Rights Law of the State of New York.

Pursuant to Section 297.2 of the Law, the State Division of Human Rights has determined that it has no jurisdiction in this matter.

It is the policy of the State Division of Human Rights not to accept jurisdiction in any case in which discrimination is charged against persons who would be called upon to investigate and/or determine the charges.

Upon the foregoing, the complaint is ordered dismissed and the file is closed.

The complainant or any party to the proceeding before the Division may appeal this order to the State Human

Decision of New York State Division of Human Rights

Rights Appeal Board, 250 Broadway, New York, New York 10007, by filing a notice of appeal within fifteen (15) days after the date of the mailing of this order. (Emphasis supplied.)

DATED:

STATE DIVISION OF HUMAN RIGHTS

By Albert Herchick
Albert Herchick
Regional Manager

TO:
Mr. Ramon Colon, Complainant
342 East 32nd Street
Brooklyn, New York 11226

State of New York - Respondent
Division of Human Rights
270 Broadway
New York, New York 10007

Att: Jack M. Sable, Commissioner

cc:
Ruperto Ruiz, Assistant Commissioner
Honorable Robert J. Mangum
NYS Court of Claims
270 Broadway, New York, N.Y. 10007

APPENDIX B – ORDER OF APPELLATE DIVISION OF STATE OF NEW YORK

RAMON COLON,
Complainant-Appellant,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, JACK M. SABLE, Commissioner; RUPERTO RUIZ, Assistant Commissioner, and ROBERT J. MANGUM,
Respondents.

The above entitled appeal having come on for consideration by this Board on the 21st day of December 1971, and oral argument not having been requested by any of the parties herein, and the Board having reviewed the record and having decided that the order appealed from is not arbitrary, or capricious or an abuse of discretion, it is

ORDERED that the Decision and Order of the Division of Human Rights made herein on the 5th day of November 1971, be and the same hereby is in all respects affirmed.

Dated: December 31, 1971

Mailed: January 11, 1972

STATE HUMAN RIGHTS APPEAL BOARD

By Edward Conway
Edward Conway, Chairman

APPENDIX C - OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAMON COLON,
Complainant-Appellant,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, JACK M. SABLE, Commissioner; RUPERTO RUIZ, Assistant Commissioner, and ROBERT J. MANGUM,
Respondents.

MEMORANDUM

BONSAL, D. J.

Plaintiff, a retired employee of the Division of Human Rights of the State of New York ("Human Rights Division"), instituted this action on August 11, 1972, pursuant to 42 U.S.C. Sections 1981 and 1983, claiming a denial of equal protection of the law under the 14th Amendment to the United States Constitution due to discrimination by defendants in denying him equal terms, conditions and rights of promotion because of his national origin. He named as defendants the Human Rights Division; Mr. Jack M. Sable, Commissioner; Mr. Rupert Ruiz, Assistant Commissioner; and Mr. Robert J. Magnum. Plaintiff alleges (1) that he filed a verified complaint on October 20, 1971 with the Human Rights Division, charging it with unlawful discriminatory practices relating to his employment; and (2) that his complaint was

dismissed pursuant to New York Executive Law Section 297.2 on the ground that the Human Rights Division did not take jurisdiction in cases in which discrimination is charged against the persons who would be called on to investigate or determine the charges.

Plaintiff contends that Section 297.2 is an unconstitutional denial of equal protection in that it allows the Human Rights Division to refuse to accept jurisdiction in cases involving its own employees.

Plaintiff seeks an order requiring defendants to promote him retroactively from Field Representative to a policy-making position and to award him back pay and damages in the amount of $1,000,000, and full pension benefits. Jurisdiction is claimed under 28 U.S.C. Section 1331.

Defendants move for an order granting judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

From the affidavits submitted — both by defendants and by the plaintiff — it appears that the following facts are undisputed: Plaintiff, who is of Puerto Rican origin, was hired as a provisional Field Representative for the Human Rights Division in 1964. In 1965 he was appointed a permanent Field Representative and continued to be employed in that position until May 1, 1972, when he retired, having reached the mandatory retirement age of 70. On July 1, 1970, and on other occasions, plaintiff

requested promotion to a policy-making position in the Human Rights Division, which requests were denied. The Human Rights Division's determination on November 5, 1971 that it lacked jurisdiction over plaintiff's complaint was upheld by the New York State Human Rights Appeal Board on December 31, 1971. Thereafter, plaintiff sought judicial review pursuant to Section 298 of the New York Executive Law. The agency determination was affirmed by the Appellate Division, First Department, on April 13, 1972. It appears from the papers submitted that the Human Rights Division does employ Puerto Rican and Spanish-speaking persons in policy-making positions, including one of the named defendants. [1]

The narrow issue presented here is whether Section 297.2 of the New York Executive Law is constitutional. Section 297.2 provides:

> "Within fifteen days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause

1. Attached to Commissioner Jack Sable's affidavit in support of the present motion is a letter from Mr. Robert J. Magnum to plaintiff, dated September 10, 1970. That letter lists five Spanish-speaking and Puerto Rican persons employed by the Human Rights Division in policy-making positions: Mr. Ruperto Ruiz, Mr. William Vega, Mr. Anthony Sirvent, Mr. George Benitez, and Mr. Jose Torres.

> does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent."

This subsection is part of the larger statutory scheme contained in Section 297, which provides that:

> "1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of.
>
> * * *
>
> "9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder . . . provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed."

In *State Division of Human Rights v. Luppino*, 35 A.D. 2d 107, 313 N.Y.S.2d 28 (2d Dept. 1970), *aff'd*, 29 N.Y.2d 558, 324 N.Y.S.2d 298 (1971), the court held that "in enacting section 297 . . . of the Executive Law, the Legislature intended to give individuals a choice. They

could either elect to sue in court and recover all damages which they could establish . . . or they could elect to seek administrative relief under the Human Rights Law." 313 N.Y.S.2d at 32. See *Cluett, Peabody & Co. v. New York State Division of Human Rights*, 59 Misc. 2d 536, 299 N.Y.S. 2d 974 (Sup. Ct. Orange Cty. 1969).

On its face, Section 297.2 is nondiscriminatory. The Human Rights Division's policy not to take jurisdiction in cases involving its own employees is reasonable and rationally-based, operating equally with respect to all of its employees. Moreover, the policy only precludes administrative action; it does not preclude the institution of a suit in the New York State courts. Therefore, Section 297.2 is a proper exercise of state power and is not arbitrary nor capricious. See *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970). See also *Jefferson v. Hackney*, 406 U.S. 535, 545-51 (1972); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73 (1972). Nor has plaintiff here set forth facts sufficient to demonstrate that his nonpromotion was arbitrary, capricious, or constituted a violation of his civil rights. The bare assertion of legal conclusions is not enough. *Powell v. Workmen's Compensation Board*, 327 F.2d 131, 137 (2d Cir. 1964); *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972). Since plaintiff fails to raise a substantial federal question, his complaint is dismissed.[2] *Christman v. Skinner*, F.2d (2d Cir. October 30, 1972).

2. Since promotion or nonpromotion of employees is a matter of supervisory discretion, *Gnotta v. United States*, 415 F.2d 1271, 1276 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970), particularly when promotions are to policy-making positions, it did not constitute a deprivation of due process for the Human Rights Division to decline to state its reasons for promoting others than the plaintiff.

Opinion of the District Court

Defendants contend that plaintiff's action is barred by the 11th Amendment to the United States Constitution. They argue that any injunctive or declaratory relief would be moot due to plaintiff's retirement and that a federal court, absent New York State's consent, is without jurisdiction to enter a judgment declaring a liability which must be met from the public funds of the state. See *Rothstein v. Wyman*, 467 F.2d 226, 236-39 (2d Cir. 1972). Because of the above disposition of defendants' motion, it is not necessary to reach this issue.

For the foregoing reasons, defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed.

It is so ordered.

Dated: New York, N. Y.
January 5, 1973

s/ Dudley B. Bonsal
U.S.D.J.

APPENDIX D – JUDGMENT OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAMON COLON,
Complainant-Appellant,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, JACK M. SABLE, Commissioner; RUPERTO RUIZ, Assistant Commissioner, and ROBERT J. MANGUM,
Respondents.

Defendants having moved the Court for an order granting judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Dudley B. Bonsal, United States District Judge, and the Court thereafter on January 5, 1973, having handed down its memorandum decision granting the defendants' motion for summary judgment and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That the defendants, STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, ROBERT J. MAGNUM, JACK M.

Judgment of the United States District Court

SABLE, COMMISSIONER, AND RUPERT RUIZ, ASSISTANT COMMISSIONER, have judgment against the plaintiff, RAMON COLON, dismissing the complaint.

Dated: New York, N. Y.
January 6, 1973

s/ John Livingston
Clerk

APPENDIX E – JUDGMENT OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For The
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January one thousand nine hundred and seventy-four.

Present:

HON. JOHN A. DANAHER

HON. WILLIAM H. MULLIGAN

HON. WILLIAM H. TIMBERS

Circuit Judges.

Judgment of the United States Court of Appeals

Ramon Colon,

Plaintiff-Appellant,

v.

State of N.Y., Div. of Human Rights, Robert J. Magnum, Jack M. Sable, Commissioner, & Robert Ruiz, Asst. Commissioner,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

s/ John A. Danaher
JOHN A. DANAHER

s/ William H. Mulligan
WILLIAM H. MULLIGAN

s/ William H. Timbers
WILLIAM H. TIMBERS